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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. BLOCK
CHARLES A. GOLDMARK
O. YALE LEWIS, JR.
WICKWIRE, LEWIS, GOLDMARK & SCHORR
500 Maynard Building
Seattle, Washington 98104

Attorneys for the Inupiat Community of the Arctic Slope

HARRY R. SACHSE
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Washington, D.C. 20036

Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Inupiat Community of the Arctic Slope petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Atlantic Richfield, et al.*, Nos. 77-3234 and 77-3972 (9th Cir., filed Jan. 4, 1980).

OPINIONS BELOW

The opinion of the Court of Appeals (App. at 1-15) is not reported. The opinion of the district court (App. at 16-58) is reported at 435 F.Supp. 1009 (D. Ak. 1977). The opinion in the related case of *Edwardsen* v. *Morton* (App. at 59-100) is reported at 369 F.Supp. 1359 (D.D.C. 1973).

JURISDICTION

The judgment of the Court of Appeals (App. at 101-102) was entered on January 4, 1980. On March 24, 1980, Justice Rehnquist granted the application of the Inupiat Community of the Arctic Slope for an extension of time and extended the time for filing this petition for certiorari to and including May 2, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Congress, in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627, intended to take accrued trespass claims of Alaska Natives and thereby transfer liability for such trespasses from the trespassers to the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Alaska Native Claims Settlement Act § 4, 43 U.S.C. § 1603:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

STATEMENT OF THE CASE

This is a trespass action brought by the United States for the Inupiat Eskimos as their trustee and for itself as sovereign. The Inupiat Community of the Arctic Slope, the recognized tribal representative of the Inupiat Eskimos, intervened as a co-plaintiff. Both the United States' and the Eskimos' complaints seek damages for trespasses to the Eskimos' lands occurring before termination of the Eskimos' common law and statutory rights to exclusive possession of the land by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1627.

A. The Eskimos' Interests and the Trespasses.

For thousands of years, the Eskimos have used and occupied the lands of the Arctic Slope in Alaska. This use and occupancy gave rise, under settled federal common law, to a right of possession that could be terminated by the sovereign without compensa-

tion but which, until terminated, was "as sacred as the fee-simple of the whites." *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *accord*, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668-69 (1974). In particular, trespasses on the Eskimos' lands gave rise to tort causes of action enforceable in the same manner as any other cause of action. *See* pp. 12-13 *infra*. The Eskimos' possessory rights to the land were further guaranteed by federal statute, and violations of those statutory rights also gave rise to rights of action for trespass. *See* p. 13 *infra*.

The Eskimos' undisturbed enjoyment of their land continued for longer than most Alaska Natives. The Arctic Slope is a remote area in the most northern part of Alaska, lying between the Brooks Range and the Arctic Ocean. Until 1968, there was virtually no non-Native activity in this area. In the mid-1960's, however, the State of Alaska began making selections of land under color of the Alaska Statehood Act and issuing conditional oil and gas leases [1] on "tentatively approved" selection in the Arctic Slope region. Because land held by the Natives was expressly excluded from selection,[2] the Eskimos and the Bureau

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[1] Because the leases were issued on lands that had not been patented to the State of Alaska but rather had only been "tentatively approved" by the United States, the leases were granted "without warranty" and with the proviso that even if the State's title was not valid, lease payments made would not be refunded. State Lease Form DL-1, ¶ 37.

[2] Alaska Statehood Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339, §§ 4, 6 (1958), 48 U.S.C. note prec. § 21; see *Alaska* v. *Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).

of Indian Affairs protested Alaska's actions.[3] The Eskimos also notified oil companies conducting exploration activities that any entry on the lands would be trespassory.[4]

In November, 1966, in response to the Native protests, the Secretary of Interior suspended all tentative approvals of Alaska's land selections and all federal leasing in Alaska.[5] This restraint on development of land in Alaska immediately created pressure for a land settlement with the Natives, and lobbying began on the Alaska Native Claims Settlement Act.

Although the oil companies were put on notice by the Department of Interior's land freeze and the Eskimos' letters that their presence on the Arctic Slope was trespassory, oil exploration continued apace, both under color of conditional state leases and without any authorization whatsoever. In February 1968, Atlantic Richfield struck oil at its Prudhoe Bay State No. 1 well, and the stream of exploration became a flood.

> Within the space of a few months, oil explorations uprooted and destroyed the wilderness character of an area larger than Massachusetts. By January 1969, more than a dozen companies holding exploration leases were in a mad scram-

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[3] The history of the protests is discussed in S. Rep. No. 92-405, 92d Cong., 1st Sess. 96-97 (1971).

[4] *See, e.g.*, letter of April 13, 1965, to Atlantic Refining Company, attached as Exhibit A to the opening brief of the Eskimos in the trial court.

[5] The suspension is described in S. Rep. No. 92-405, 92d Cong., 1st Sess. 97 (1971); *see also* P.L.O. 4582, 34 Fed. Reg. 1025 (1969), extending the land freeze.

ble for a piece of the action, jockeying for position in haste and secrecy, driven by sheer compulsion as well as need. Seismic crews roamed the area in amphibious vehicles drilling the subsurface and testing it with explosives.[6]

In preparation for the present case, the United States investigated the trespasses and determined that there was credible evidence of substantial damage to the Inupiat Eskimos. The complaint of the United States, based upon its preliminary investigation, alleges that the damages caused by the trespassers included, but were not limited to:

(a) Removing vast quantities of sand and gravel;

(b) Disturbing migratory or feeding patterns of sea mammals, fish, and game to the detriment of Eskimo hunting and fishing;

(c) Damaging physical properties such as buildings, campsites, hunting and trapping grounds, cellars and caches;

(d) Killing game animals to the significant detriment of the Eskimos;

(e) Constructing airfields, buildings, roads, living units, drilling pads, and other structures,

(f) Damaging Eskimo graveyards and consecrated areas;

(g) Extracting quantities of oil and gas; and

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[6] Frome, "Hickel and the Arctic," *Field and Stream* (Nov. 1969), quoted in *Hearings on the Status of the Proposed Trans-Alaska Pipeline Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 2, p. 275 (1969).

(h) Obtaining geophysical information of great value.

United States Complaint, ¶ X, pp. 6-7.[7]

Discovery in this case has been stayed pending resolution of the defendants' motion to dismiss. The Eskimos believe that after full discovery the evidence will show trespass damages in excess of $500 million.

B. The Alaska Native Claims Settlement Act.

Even as the trespasses continued, the oil companies recognized that their future rights to develop the land were in serious question because of the Eskimos' unextinguished rights to possession of the land.

The cloud on development of Prudhoe Bay and the freeze on any approval of Alaska's land selections intensified the efforts toward passage of an act to settle the land dispute, and in 1971 Congress passed

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[7] The United States claims damages in this case for entries to land aboriginally used and occupied by the Arctic Slope Eskimos where: (1) the entry was unauthorized; (2) the entry and trespass were under color of the Alaska Statehood Act of 1958, 72 Stat. 339, but in violation of the explicit terms contained therein which affirmatively protected Native rights; or (3) the entry was made under federal authorization but the entry interfered with substantial and notorious Native use resulting in destruction of Native possessions, such as homes, hunting or trapping grounds, and other physical structures. *See* United States Complaint, Record at 1-8; *United States* v. *Atlantic Richfield Co., et al.*, App. at 16-17 n.2, 435 F. Supp. 1009, 1014 n.2 (D. Ak. 1977).

The Inupiat Community of the Arctic Slope claims damages for all entries on the Arctic Slope prior to the enactment of the Alaska Native Claims Settlement Act on December 18, 1971. *See* Inupiat Community Complaint, Record at 18-24; *United States* v. *Atlantic Richfield Co., et al.*, App. at 16-17 n.2, 435 F. Supp. 1009, 1104 n.2 (D. Ak. 1977).

the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 ("ANCSA"). ANCSA's purpose and effect was to open Alaska to future development and to validate the clouded land titles of non-Natives.[8]

C. Proceedings Below.

Before passage of the Alaska Native Claims Settlement Act, the Eskimos had filed an action in the United States District Court for the District of Columbia, seeking injunctive relief and a declaration that Alaska's land selections under the Alaska Statehood Act were void. *Edwardsen* v. *Morton*, Civ. No. 2014-71 (D.D.C., complaint filed October 5, 1971). This action, which threatened to halt all development and to require renegotiation of the Prudhoe Bay leases, was one of the factors that prompted ANCSA's passage.

After ANCSA's enactment, the Eskimos amended their complaint in *Edwardsen* to seek, in addition to a declaration that Alaska's pre-ANCSA land selections were void, an accounting for funds received by the United States from trespassers on the Eskimos' lands.

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[8] Section 4 of the ANCSA, 43 U.S.C. § 1603, "Declaration of Settlement," accomplishes this purpose in three subsections that constitute an integral scheme for removing the cloud of Native title claims to Alaska's lands: Subsection 4(a) prevents future challenges to pre-ANCSA oil leases and certain other land conveyances on the grounds that such conveyances had been made in derogation of aboriginal title and were therefore void; subsection 4(b) gave the United States clear title to the remaining land by terminating all aboriginal titles, thus allowing unclouded future conveyances to the State; and subsection 4(c) bars all challenges to and claims for compensation for the termination of Native possessory rights.

The United States moved for summary judgment on all elements of the Eskimos' *Edwardsen* complaint, arguing (1) that ANCSA extinguished all of the Eskimos' present claims to land and validated previously void titles; and (2) that the Eskimos were not entitled to any trespass accounting because ANCSA extinguished all causes of action for pre-ANCSA trespasses.

Judge Oliver Gasch granted the United States' motion regarding the title claim, holding that ANCSA had terminated present Native title and validated previously void non-Native titles. *Edwardsen* v. *Morton*, App. at 90-92, 369 F. Supp. 1359, 1377-78 (D.D.C. 1973).

The court held, however, that summary judgment could not be granted on the trespass issue. Causes of action arising out of the trespasses were not extinguished by Section 4 of ANCSA. App. at 94-96; 369 F. Supp. at 1379. Congress, the judge found, specifically stated in S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971)—the authoritative explanation of ANCSA's extinguishment provisions—that tort claims, which would include the Eskimos' trespass causes of action, had not been extinguished. Moreover, a different construction of Section 4 would create constitutional infirmities in ANCSA because the Eskimos' tort claims were vested property rights protected by the Fifth Amendment, which could not be taken without just compensation. Accordingly, Judge Gasch ruled that ANCSA could not be construed as taking the Eskimos' accrued trespass causes of action. *Ibid.*

The United States and the Eskimos thereupon entered into an agreement for prosecution of the

pre-ANCSA trespassers on Eskimo lands. The instant case, the embodiment of that agreement, was filed by the United States on October 7, 1975. The Inupiat Community of the Arctic Slope intervened and filed a complaint on March 10, 1976. Jurisdiction over the claims of the United States is founded on 28 U.S.C. § 1345. Jurisdiction over the claims of the Inupiat Community is founded on 28 U.S.C. §§ 1331 and 1362.

In the district court, the defendants moved to dismiss on a number of grounds, including a claim that ANCSA took the Eskimos' accrued causes of action for trespass. The District Judge, Judge Fitzgerald, granted the defendants' motions and ordered the complaints dismissed on the ground that ANCSA had extinguished the Eskimos' and the United States' accrued causes of action.

After Judge Fitzgerald's decision, the Eskimos were forced by statute of limitations considerations to file suit against the United States for just compensation for the taking of their accrued causes of action. *Inupiat Community of the Arctic Slope* v. *United States*, No. 596-77 (Ct. Cl., filed Dec. 16, 1977). That action is presently stayed pending resolution of this proceeding in which the United States and the Eskimos are attempting to collect the trespass damages from the actual trespassers.

On appeal from Judge Fitzgerald's decision, the Ninth Circuit affirmed. It held that ANCSA did take the Eskimos' causes of action and, recognizing the possibility that this taking would render the United States liable for compensation for that taking, stated:

> Our disposition of this case makes it unnecessary for us to decide . . . whether or not Congress gave just compensation for the package of various Native properties and interests it took and extinguished by giving the Natives 40 million acres of land and nearly a billion dollars; and . . . whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States. Perhaps these questions will be decided in *Inupiat Community of the Arctic Slope* v. *United States*, No. 596-77 (Ct. Cl., filed Dec. 16, 1977). *We note that if they are decided favorably to the Inupiats there, the Inupiats might recover as just compensation from the United States the same amount that they could have recovered from the trespassing private defendants in the absence of the Act.*

App. at 15, slip op. at 13 (emphasis added).

REASONS FOR ISSUING THE WRIT

Three reasons require the issuance of a writ of certiorari to review the decision of the Ninth Circuit: (1) the potential impact of the decision on the United States Treasury and on the intent and constitutionality of ANCSA; (2) the importance of this case to Alaska Natives; and (3) the need to resolve a conflict of opinion among lower federal courts.

I. The Decision of the Court of Appeals Shifts an Enormous, Indeterminate Liability for Pre-ANCSA Trespasses from the Oil Companies to the United States Despite the Contrary Intent of ANCSA.

The Eskimos' accrued trespass causes of action are constitutionally protected rights that may not be taken without payment of just compensation. Part A

infra. Congress carefully drafted ANCSA to avoid taking any protected rights and thus to avoid subjecting the United States to liability of indeterminate magnitude. Part B *infra.*

The Ninth Circuit's decision that Section 4 of ANCSA effected a taking of the Eskimos' trespass causes of action is an error in statutory construction of major signifiance. Under that decision, either the United States' Treasury is liable for the oil companies' trespasses or ANCSA is unconstitutional because it takes property without just compensation. Part C, *infra.*

A. *The Eskimos' Accrued Causes of Action Are Constitutionally Protected Rights That May Not Be Taken Without Just Compensation.*

Aboriginal or "Indian" title, such as that held by the Eskimos before ANCSA's passage, is an absolute right to exclusive possession of land.[9] Like a tenancy at will, the Indian right to exclusive possession may be terminated by Congress without just compensation,[10] but until terminated by the sovereign, aboriginal land rights are "as sacred as the fee-simple, absolute title of the whites." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831); *accord*, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668-69 (1974). The oil company trespassers'

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[9] *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668-69 (1974); *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941); *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223, 232 (1850).

[10] *See Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279 (1955).

violation of the Eskimos' common law aboriginal title rights gave rise to accrued causes of action for trespass identical to the causes of action held by any landholder whose possessory rights are violated.[11]

In addition to their common law aboriginal title, the Eskimos held federal statutory rights to exclusive possession of the Arctic Slope lands they used and occupied.[12] As with their common law possessory rights, violations of the Eskimos' statutory possessory rights gave rise to accrued trespass causes of action.[13]

An accrued cause of action for trespass is constitutionally protected. Thus, while Congress affects no constitutionally protected rights when it prospectively terminates a common law or statutory right, as when it terminates a tenancy at will or aboriginal title, a cause of action for violation of such rights

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[11] *See, e.g., United States* v. *Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977); *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973); *see also Marsh* v. *Brooks*, 49 U.S. (18 How.) 223, 232 (1850) (ejectment); F. Cohen, *Handbook of Federal Indian Law*, 306, 311 (G.P.O. 1945).

[12] Act of May 17, 1884, ch. 53, 23 Stat. 24, § 8; Act of March 3, 1891, ch. 561, 26 Stat. 1095, § 14; Act of June 6, 1900, ch. 786, 31 Stat. 321, § 27; Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, § 4, 48 U.S.C. note prec. § 21.

[13] See, e.g., *Heckman* v. *Sutter*, 119 F. 83 (9th Cir. 1902), *aff'd on rehearing*, 128 F. 393 (1904); *United States* v. *Berrigan*, 2 Alas. Rpts. 442 (D. Ak. 1905); *Johnson* v. *Pacific Coast S.S. Co.*, 2 Alas. Rpts. 224 (D. Ak. 1904); *United States* v. *Cadzow*, 5 Alas. Rpts. 125 (D. Ak. 1914).

accruing before termination of the right cannot be taken without due process and just compensation.

> A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged.

Angle v. *Chicago, St. Paul, M. & O. R.R.*, 151 U.S. 1, 19 (1893).[14]

Because accrued trespass claims are constitutionally protected even when there is a subsequent complete taking of the underlying title to land by the government, causes of action for prior trespasses to possession remain in existence unless the trespass damages are litigated in the condemnation proceedings and expressly provided for in the condemnation award.[15]

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[14] *Accord, Coombs* v. *Getz*, 285 U.S. 434, 442 (1932); *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933); *Ettor* v. *City of Tacoma*, 228 U.S. 148, 156 (1913); *Cincinnati* v. *Louisville & N. R.R.*, 223 U.S. 390, 400 (1912); *Pritchard* v. *Norton*, 106 U.S. 124, 132 (1882); *Osborn* v. *Nicholson*, 80 U.S. (13 Wall.) 654 (1870); *Pacific M. S.S.* v. *Joliffe*, 69 U.S. (2 Wall.) 450 (1865); *Farbwerke, Vormals, Meister, Lucius & Bruning* v. *The Chemical Foundation, Inc.*, 39 F.2d 366, 371 (3d Cir. 1930), *aff'd*, 283 U.S. 152 (1931).

[15] *See, e.g., Wehrum* v. *Lincolnwood*, 91 Ill. App.2d 418, 235 N.E.2d 343 (1968); *Cochran Coal* v. *Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955), *citing wtih approval Shevalier* v. *Postal Telegraph Co.*, 22 Pa. Super. 506 (1903), and *Keil* v. *Chartiers Val. Gas Co.*, 131 Pa. 466, 19 A. 78, 79

As Judge Gasch explicitly held in *Edwardsen* v. *Morton*, and as the Ninth Circuit implicitly recognized below, the Fifth Amendment protects the Eskimos' accrued causes of action for trespasses occurring prior to ANCSA's termination of their exclusive possessory rights to the Arctic Slope. Those protected rights cannot be taken without just compensation.

B. *Congress Drafted ANCSA to Preserve Constitutionally Protected Rights and Specifically Intended That ANCSA Preserve Accrued Tort Causes of Action.*

When constitutionally protected property is taken by legislative action, just compensation is required, and the courts, not Congress, determine the amount to be paid.[16] When Congress takes protected rights, the determination of just compensation is often subject to a great deal of delay and uncertainty owing to the factual and legal complexities of such proceedings in the Court of Claims. By contrast, the termination of constitutionally unprotected rights can be accomplished quickly and with certainty because Congress, and Congress alone, can determine what, if any, compensation is proper.

Congress deliberately drafted ANCSA to avoid taking any protected rights and thus to avoid the

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(1890); *Tuttle* v. *State*, 138 Misc. 1, 244 N.Y.S. 553 (1930); *Terhune* v. *Gorham*, 225 Ky. 249, 8 S.W.2d 431 (1928); *Fort Worth* v. *Dietert*, 271 S.W.2d 299 (Tex. Civ. App. 1954); *Texas Pipeline Co.* v. *Ennis*, 57 S.W.2d 178 (Tex. Civ. App. 1933), *rev'd on other grounds*, 127 Tex. 470, 93 S.W.2d 148 (1933).

[16] *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 n.39 (1974); *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 327 (1893).

judicial scrutiny, delay, and indeterminate federal liability that such a taking would involve.[17] In considering several early legislative proposals that would result in potential suits in the Court of Claims, Congress rejected the proposals: (1) to avoid the lengthy litigation against the United States and the uncertainty that would result,[18] (2) to avoid judicial scrutiny as to the amount of compensation to be awarded the Natives;[19] and (3) to avoid the federal liability of indeterminate magnitude that any taking of protected rights would create.[20]

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[17] In the recently enacted Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 25 U.S.C. §§ 1701-1712, Congress again carefully distinguished between unprotected Indian rights such as unrecognized aboriginal title and protected rights such as claims for trespass to aboriginal title. *See* S. Rep. No. 95-972, 95th Cong., 2d Sess. 9, 13 (1978); H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. 9, 12-13 (1978).

[18] *See, e.g., Hearings on S. 2906 and Related Bills Before the Senate Comm. on Interior and Insular Affairs,* 90th Cong., 2d Sess. 25, 27 (1968) (*"1968 Senate Hearings"*) (Cong. Pollock); 117 Cong. Rec. 37092 (1971) (Cong. Taylor). *See also* S. Rep. No. 92-405, 92nd Cong., 1st Sess. 78 n.9 (1971); 1968 *Senate Hearings* at 537 (Sec'y of Interior Udall); *Hearings on H.R. 11213, H.R. 15049 and H.R. 17129, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 90th Cong., 2d Sess. 116 (1968) (Cong. Meeds); H.R. Rep. No. 92-523, 92nd Cong., 1st Sess. 4 (1971).

[19] *See, e.g.,* H.R. Rep. No. 92-523, 92nd Cong., 1st Sess. 4 (1971); S. Rep. No. 92-405, 92nd Cong., 1st Sess. 77-78 (1971); *Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 92nd Cong., 1st Sess. 65, 66 (1971) (*"1971 House Hearings"*) (Cong. Aspinall).

[20] *See, e.g., 1971 House Hearings, supra* note 19, at 54-66 (Cong. Aspinall).

In adopting the final terms of ANCSA, members of Congress emphasized that no protected rights were to be taken, and thus the unacceptable consequences of such a taking would be avoided.

> [T]here should be no misunderstanding about the fact that Congress has the sole power and responsibility for determining what is fair compensation for the extinguishment of aboriginal title . . . . It is settled law that aboriginal title is not compensable under the due process clause of the fifth amendment, and that Congress can extiniguish an aboriginal title without paying anything if it wishes to do so.[21]

Accordingly, Congress did not need to calculate the value of the rights extinguished:

> The $925,000,000 figure is an arbitrary one. It is not intended to be related to the value of the lands claimed by the Natives under the doctrine of aboriginal title.
>
> . . . .
>
> [I]t is based on the following considerations: the extreme poverty and underprivileged status of the Natives generally, and the need for adequate resources to permit the Natives to help themselves economically.

H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 5-6 (1971). *See also S. Rep. No. 92-405*, 92d Cong., 1st Sess. 82 (1971); 117 Cong. Rec. 36851 (1971).

As the State of Alaska later stated: "We believe that Congress could not and did not intend . . . [to] reach constitutionally protected rights of action."

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[21] *Id.* at 65 (Cong. Aspinall).

Hearings on Amendments to Alaska Native Claims Settlement Act Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., pt. 1, p. 75 (1975).

From the start of ANCSA's legislative development, the Act was explicitly limited to the termination of present Native possessory rights and the removal of clouds on previously void non-Native land title—thus preserving (not taking) accrued trespass claims.[22]

Although the wording of settlement bills changed over the course of time, no legislative history suggests that Congress ever decided to take the Natives' accrued causes of action for trespass. In the report on the final Senate version of ANCSA, a report that the Court of Appeals dismissed as a "hasty mistake," the Senate Interior Committee carefully explained that:

> [The extinguishment provision] declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska. The language specifically includes submerged lands and any aboriginal hunting and fishing rights. The extingiushment [sic] is final and effective not only for claims against the United States but also for any claims against the State of Alaska and all other persons. *Remaining in effect and unextinguished by this Act are all claims which are based upon*

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[22] *See, e.g.*, Amendment No. 221 to S. 1830 and S. 3041, 91st Cong., 1st Sess. (1969); S. 1830, 91st Cong., 2d Sess. (1970); S. Rep. No. 91-925, 91st Cong., 2d Sess. 114-15 (1970).

> *grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits* for an accounting for funds belonging to Natives or Native groups in the custody of the United States, *for tort* or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act.

S. Rep. No. 92-405, 92d Cong., 1st Sess. 110-11 (1971) (emphasis added). Even if the Court of Appeals were not so clearly in error in attempting to dismiss this unequivocal statement as a "hasty mistake" by drafters of the committee report,[23] this is the stated

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[23] *United States* v. *Atlantic Richfield, et al., supra,* App. at 12, slip op. at 10. Contrary to the belief of the Court of Appeals, the report clearly was not a "hasty mistake" describing the 1971 Senate bill (S. 35) in language applicable only to the 1970 Senate bill (S. 1830). The section of the report referred to explained the provisions of Section 4 of the Senate bill, "Declaration of Settlement." The report carefully explained the changes made from the 1970 bill. For example, the report explains that the 1971 bill contains a new provision for ratifying "tentative approvals pursuant to Section 6(g) of the Alaska Statehood Act." Indeed, of nine paragraphs in the report explaining the terms of the extinguishment provisions, only one paragraph describes the 1971 bill in the same terms as were used to explain the 1970 bill—the paragraph preserving claims sounding in tort or contract. *Compare* S. Rep. No. 91-925, 91st Cong., 2d Sess. 14-15 (1970) *with* S. Rep. 92-405, 92d Cong., 1st Sess. 110-11 (1971).

Senator Jackson drafted and introduced both S. 1830 and S. 35. He chaired the Senate Interior Committee that prepared the 1970 and 1971 reports explaining both bills. The theory that Senator Jackson made a major change in one of

[footnote continued]

meaning that the full Senate had before it when it voted to approve the bill. When the full Senate passed the Senate version of ANCSA, it did so with the understanding that the Act would not take the Natives' accrued trespass causes of action.

The Senate bill went to conference and the wording of the settlement provision was changed. In the Conference Report, however, the Senate was reassured that the new wording, later enacted as ANCSA, would have the same effect as the Senate bill.

> The conference report language is, in substance, the same as the language of the Senate amendment [S. 35].

S. Rep. No. 92-581, 92d Cong., 1st Sess. 40 (1971).

In sum, ANCSA was drafted to—and did—terminate present Native aboriginal land title in Alaska, and to clear the cloud from previously invalid non-Native titles. Congress explicitly intended, however, that ANCSA *not* take any protected rights, because such a taking would result in litigation against the

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his own bills and then mistakenly failed to explain it in his own committee report is simply not credible.

When S. 35 was reported out by the Senate Interior Committee with Senate Report No. 92-405, Senator Jackson told the Senate: "S. 35 is based upon the language of S. 1830 as passed by the Senate in the 91st Congress." 117 Cong. Rec. 38433 (1971). He then enumerated eight "major" changes between S. 1830 and S. 35. None of those changes included a change in the definition of Native claims to be extinguished. 117 Cong. Rec. 38433 (1971). The changes in extinguishment language between S. 1830 and S. 35 were for stylistic purposes only. Senate Report No. 92-405 was not a "mistake".

United States, judicial scrutiny of the terms of the settlement, and an indeterminate liability of potentially great magnitude against the United States Treasury.

C. *The Decision of the Ninth Circuit Will Result Either in a Tremendous Liability Against the United States Treasury or a Situation in Which the Alaska Native Claims Settlement Act is Unconstitutional—Both Results That Congress Clearly Intended to Avoid in Enacting ANCSA.*

As both Judge Gasch and the Ninth Circuit have recognized, if ANCSA took constitutionally protected causes of action, that taking is unconstitutional unless the Eskimos receive just compensation. The compensation received by the Eskimos in ANCSA was neither calculated to compensate them for their trespass causes of action [24] nor did it do so.[25] ANCSA is

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[24] Congress emphasized again and again that the numbers chosen for the settlement were "arbitrary." *See, e.g.*, H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 5-6 (1971); S. Rep. No. 92-405, 92d Cong., 1st Sess. 82 (1971); 117 Cong. Rec. 36851 (1971). ANCSA's legislative history contains not a scintilla of evidence that anyone attempted to value the Natives' accrued causes of action for pre-ANCSA trespasses.

[25] Although Alaska Natives as a whole received a substantial award for termination of their aboriginal titles, the structure of the settlement distribution resulted in the Arctic Slope Eskimos receiving far less than would be necessary to compensate them if ANCSA had taken their protected trespass causes of action. Under ANCSA's terms, the Eskimos will receive only 5% of the cash settlement, an amount that is reduced substantially in value because it will be paid out over a term of years without interest, resulting in a significant discounting due to the loss of the time value of money. The

[footnote continued]

therefore unconstitutional unless the Eskimos are entitled to seek just compensation from the United States in the Court of Claims. Such a suit, with its protracted litigation and potential impact on the United States Treasury, is precisely what Congress intended to avoid. *See also Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412-13 (1968) (statutes should not be construed so as to expose the United States to liability for taking property rights). The alternative, that the Eskimos are not entitled to seek just compensation in the Court of Claims, would result in the entire settlement being unconstitutional—a result equally contrary to the purpose of Congress and to this Court's settled principles. *See Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (statutes should be construed, whenever possible, so as to avoid constitutional infirmities).

This Court should issue a writ of certiorari in this case to avoid total frustration of the Alaska Native Claims Settlement Act.

Eskimos estimate that at present interest rates their settlement was worth less than $25 million. ANCSA also allowed the Eskimos to select 4 million acres of land, but because those selections were not permitted within the oil rich lands of the National Petroleum Reserve-Alaska, or the fertile hunting grounds of the William O. Douglas Arctic Wildlife Range, and because Alaska's selections of the oil rich Prudhoe Bay lands were confirmed by ANCSA, the Eskimos have been forced to choose lands far from their villages, with little utility for subsistence hunting and with at best speculative economic value.

Because the Act was not a fair settlement even for the Eskimos' unprotected aboriginal land titles, the Eskimos voted against Alaska Federation of Native endorsement of the bill, and, after congressional passage, sent a telegram to President Nixon urging that he veto the bill. *See* Exhibit D to the opening brief of the Eskimos in the trial court.

II. The Decision of the Ninth Circuit is of Great Importance to the Arctic Slope Eskimos and Other Alaska Natives.

The Eskimos of the Arctic Slope were the primary victims of trespassers who, in the face of explicit notice that their entries were illegal, entered Native lands and destroyed graveyards and hunting areas. Other Natives of Alaska, however, may also have been damaged by such intentional torts. There are presently pending five similar cases in which the United States and the Natives seek to recover damages from pre-ANCSA trespassers.[26] If this Court denies certiorari in this case, these plaintiffs will also be forced to seek compensation for those damages from the United States.

Additionally, ANCSA is the last great settlement between Native Americans and the United States. A definite interpretation of that Act on this important issue, the extinguishment of all trespass claims that occurred before the Act, deserves a decision by this Court.

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[26] *Chilkat Tribe of Indians* v. *Moose Valley Lumber Co.*, No. A77-160 (D. Ak., filed Aug. 4, 1977) (involving Southeastern Alaska); *United States* v. *South-Central Timber Dev., Inc.*, No. A77-253 (D. Ak., filed Dec. 16, 1977) (involving Southern Kenai Peninsula area); *United States* v. *Acoma Oil Corp.*, No. A77-254 (D. Ak., filed Dec. 16, 1977) (involving Kenai Peninsula area of Southeastern Alaska); *United States* v. *Schnable Lumber Co.*, No. A77-256 (D. Ak., filed Dec. 16, 1977) (involving Southeastern Alaska); *Gottschalk* v. *Andrus*, No. A77-146 (D. Ak., filed July 18, 1977) (involving Bristol Bay area of Western Alaska).

III. This Court Should Grant Certiorari to Resolve the Division of Opinion in the Lower Courts.

Judge Gasch has held that ANCSA did not take the Eskimos' pre-ANCSA trespass causes of action against private parties. *Edwardsen* v. *Morton*, App. at 95-96, 369 F. Supp. 1359, 1379 (D.D.C. 1973). The Court of Appeals for the Ninth Circuit has held that ANCSA did take those cases of action and thereby absolved the private trespassers from liability. Although this conflict does not necessarily prevent the Arctic Slope Eskimos from eventually recovering the full measure of their damages against the United States in the Court of Claims, it will create the possibility of conflicting findings of liability in the other suits by Alaska Natives. In light of the importance of this question to the Alaska Natives and to the United States, this Court should issue a writ of certiorari to resolve the conflict among the lower courts.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM H. BLOCK
CHARLES A. GOLDMARK
O. YALE LEWIS, JR.
WICKWIRE, LEWIS, GOLDMARK & SCHORR
500 Maynard Building
Seattle, Washington 98104

Attorneys for the Inupiat Community of the Arctic Slope

HARRY R. SACHSE
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Washington, D.C. 20036

Of Counsel

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